UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

EXEMPLAR ENTERPRISES, INC. **Employer** **and** **SEIU LOCAL 87,** **Petitioner.**	**Case No. 20-RC-149999**

EMPLOYER'S STATEMENT IN OPPOSITION TO UNION'S REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Thomas Scott Stewart
scott.stewart@ogletreedeakins.com
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
3800 Howard Hughes Parkway, Suite 1500
Las Vegas, NV 89169
720-369-6800

Attorneys for Employer
Exemplar Enterprises, Inc.

I. INTRODUCTION

The Board should deny the Service Employees International Union, Local 87's ("SEIU" and/or "Union") request for review. The Acting Regional Director based her decision on officially reported precedent and, therefore, no "compelling reason" exists to grant the request. NLRB Rules and Regulations §102.67(c).

As a preliminary matter, the Board can disregard the Summary of Facts included in the Union's request for review. The "facts" provided there are entirely unsupported by citations to the record and, indeed, substantial portions of this section are not facts at all, but conclusory arguments put forward by the Union in support of its legal position. Exemplar Enterprises, Inc. ("Exemplar") offers, instead, the facts included in its Post-Hearing Brief before the Acting Regional Director. *Id.* §102.67(d); *see Bon Secours Hosp. Inc.*, 248 NLRB 115, 103 LRRM 1375 (1980) (although the facts that the Board considers generally are restricted to those included in the request and in the statement in opposition, the Board may examine other portions of the record in evaluating the request).

The Acting Regional Director properly entitled the Union to seek Board certification of its status as the collective bargaining representative of the appropriate, existing single-facility unit at 630 Sansome Street. Acting Reg. Dir.'s Decision at 2. The Acting Regional Director concluded, however, that the Union's petitioned-for multi-facility unit is not appropriate because Exemplar's UN Plaza employees do not share a sufficient community of interest with the existing single-facility unit at Sansome and, further, the Union made no showing of interest among the unrepresented UN Plaza employees. *Id.*

The Union's flawed arguments for granting a review are based on mischaracterizations of the conclusions and grounds upon which the Acting Regional Director based her Decision, a

misleading presentation of the facts in this case, and a misconstrued treatment of the applicable law. The request therefore should be denied.

II. FACTS

Exemplar incorporates by reference the Facts Section included with its Post-Hearing Brief. *See* Exemplar's Post-Hearing Brief at 5-17.

III. DISCUSSION

A. The Acting Regional Director's Decision Is The Best Source For Determining How She Weighed The Multi-Factor Analysis To Find An Insufficient Community Of Interest

The Union's primary argument in its request for review is that the Acting Regional Director "determined the lack of employee interchange was the determining factor in its decision to deny the multi-facility bargaining unit." SEIU Request for Review at 4. A simple review of the Acting Regional Director's decision, however, shows that this reckless assertion is objectively wrong. Perhaps it is best to let the Acting Regional Director speak for herself about the basis for her decision:

> In summary, I conclude that the petitioned-for unit is not an appropriate unit for collective bargaining. Although I find that the employees in the petitioned-for unit are subject to centralized management and supervision, and have similar skills, duties, and working conditions, the total absence of functional integration and interchange between the two locations and the fundamental concerns about the lack of any showing of interest among the minority group of UN Plaza employees to be represented by the Petitioner render the unit sough inappropriate.

Reg. Dir.'s Decision at 2 (citations omitted). Indeed, the Acting Regional Director – after a thorough analysis of the other relevant factors, including the extent of Union organization (or, as here, lack of it at UN Plaza); bargaining history (or, again, the lack of it); employee choice (the Union failed to present any evidence showing the UN Plaza employees wanted in the bargaining

unit) and geographical separation – "consider[ed] … the 'balance[e] of salient factors' relevant to the designation of a multi-location bargaining unit," and found the unit sought to be inappropriate. *Id.* at 18.

B. The Union (Again) Misrepresents Both The Acting Regional Director's Consideration Of The Employee Choice Factor As Well As The Case Law She Relied Upon

As the Acting Regional Director explained:

> . . . although "[e]mployee choice can tip the balance in determining which of two equally appropriate units should be preferred," I cannot discern the employees' wishes from this record [citation omitted]. Accordingly, neither does employee choice "tip the balance" in favor of finding the existence of a community of interest between the UN Plaza employees and the existing Sansome Complex unit.

Id. at 16. Far from "flip[ing] . . . the rebuttable presumption on its head" or "elevating the importance" of this factor – as the Union complains (*see* SEIU's Request for Review at 5) – the Acting Regional Director merely looked to see if employee choice might resolve a "close call" on the community of interest question and, finding no evidence on the issue at all, she moved on.

The Union appears to be under the mistaken impression that the rebuttable presumption it enjoys here, as a result of seeking the multi-facility bargaining unit, means there is nothing left for the Acting Regional Director to do but simply direct an election of the requested multi-facility bargaining unit. But even the most cursory understanding of how rebuttable presumptions work should help the Union to understand that, where a union petitions for a unit greater than a single location, the presumption in favor of a single facility merely becomes "inapplicable." *Capital Coors Co.*, 309 NLRB 322 (1992). In which case, instead of simply finding a single facility presumptively appropriate, the Acting Regional Director must look to the

multi-factor community of interest test to determine which unit is most appropriate. *Bashas', Inc.* 337 NLRB 710 (2002). Indeed, even the Union admits the single-unit facility is the Board's *original* default conclusion. *See* SEIU's Request for Review at 4 (the "NLRB has a rebuttable presumption in favor of single facility bargaining units. However, that presumption does not apply where the union is . . . seeking the multi-facility bargaining unit . . .").

Likewise, the Union seems to willfully misconstrue the Acting Regional Director's reliance on the case law in support of the restrained manner in which she weighs the "showing of interest" factor.[1] In addressing the issue, the Acting Regional Director begins by noting that:

> Under Section 9(c)(5) of the Act, the extent that employees have been organized *may not be the controlling determinant* of the appropriateness of a proposed bargaining unit, but it is a factor that plays 'an affirmative part in such determinations.'

Acting Reg. Dir.'s Decision at 16 (emphasis added) (citations omitted). Only the most entrenched ideologue could read this portion of the Acting Regional Director's decision and come to the utterly nonsensical conclusion that the Acting Regional Director has "forced SEIU Local 87 to make the showing that the requested unit is appropriate."

C. <u>The Union's Dire "Sky Is Falling" Warning That The Regional Director's Decision Will Have Far-Reaching Negative Consequences Ignores The Fundamental Value Protected By The National Labor Relations Act: Employee Freedom In Exercising Rights – Not Protecting Unions</u>

Section 9(b) of the NLRA provides that the "Board shall decide in each case whether, *in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft

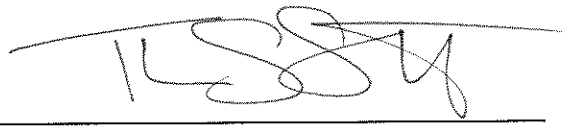
[1] For reasons unknown, the Union complains about the Acting Regional Director's manner in assessing the "employee choice" factor by referring to the Acting Regional Director's discussion of the "showing of interest" factor. SEIU Request for Review at 5. Perhaps this explains, however, why the Union counsel does not find any mention of "employee choice" in the "showing of interest" cases cited by the Acting Regional Director and, therefore, mistakenly concludes that "these cases do not stand for the proposition for which they are cited." *Id.*

the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision unit thereof" (emphasis added). Yet the Union longs for a bargaining unit certification process founded on the fundamental tenant of helping unions avoid being "forced to negotiate contracts with the same employer on a building-by-building basis." SEIU Request for Review at 6. And this really gets to the heart of the matter with the SEIU here, doesn't it? The SEIU mistakenly believes the National Labor Relations Act is a "Union Protection Act" as opposed to what it is: an Act to protect *employees*. The Union's alarming view of the law should not be entertained.

IV. CONCLUSION

For all the reasons stated above, the Board should deny the Union's request for review.

DATED this 4th day of June, 2015.



Thomas Scott Stewart
scott.stewart@ogletreedeakins.com
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
3800 Howard Hughes Parkway, Suite 1500
Las Vegas, NV 89169
720-369-6800

Attorneys for Exemplar Enterprises, Inc.

CERTIFICATE OF SERVICE

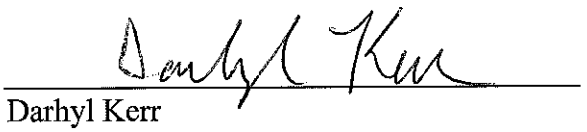
I hereby certify that on June 4, 2015, I served a full, true, and correct copy of the foregoing EMPLOYER'S STATEMENT IN OPPOSITION TO UNION'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION:

- ☐ By delivery via messenger, or otherwise by hand,
- ☐ By facsimile,
- ☒ By e-mail,
  Mailing same, postage paid,

addressed to:

Kevin Brunner
Siegel & Yee
499 14th Street, Suite 300
Oakland, CA 94612
Phone: 510-839-1200
Fax: 510-444-6698
kevinbrunner@siegelyee.com

Attorneys for Petitioner

By: 

Darhyl Kerr
Ogletree, Deakins, Nash, Smoak & Stewart
dahryl.kerr@ogletreedeakins.com
702-369-6818

21419382.1